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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-845

FRANK F. McDONALD, as Mayor of the City of Evansville, Indiana,
CITY OF EVANSVILLE, INDIANA, ET AL.,

Petitioners,

v.

VETRIS C. MILLER, ET AL.,
STATE OF INDIANA ON THE RELATION OF VETRIS C. MILLER, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

JOHN C. COX
TIMOTHY R. DODD
16 N.W. Sixth Street
Evansville, Indiana 47708
Attorneys for Petitioners

THEODORE LOCKYEAR
555 Sycamore Street
Evansville, Indiana 47708
Of Counsel for Petitioners

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. .....

FRANK F. McDONALD, as Mayor of the City of Evansville, Indiana
CITY OF EVANSVILLE, INDIANA
COMMON COUNCIL OF THE CITY OF EVANSVILLE, INDIANA

THOMAS L. OSSENBERG, REBECCA RATCLIFFE, JAMES H. SWONDER, JOHN M. CALDWELL, DAVID A. KOEHLER, BENJAMIN H. EVANS, JAMES F. ATHERTON, WILLIAM L. BROOKS, JAMES J. HELFRICH, as Members of and constituting the Common Council of the City of Evansville, Indiana
BOARD OF PUBLIC WORKS OF THE CITY OF EVANSVILLE, INDIANA
LOUIS IACCARINO, DOLPH VANDEVEER, A. S. PURDIE, as Members of and constituting the Board of Public Works of the City of Evansville, Indiana

Petitioners

vs.

VETRIS C. MILLER, COLUMBIA-EVANSVILLE REALTY, INC., individually and on behalf of all other persons owning apartment

buildings with more than four dwelling units in a single building located in City of Evansville, Indiana similarly and singularly situated with the plaintiffs,

State of Indiana on the relation of VETRIS C. MILLER, COLUMBIA-EVANSVILLE REALTY, INC., individually and on behalf of all other persons owning apartment buildings with more than four dwelling units in a single building located in City of Evansville, Indiana similarly and singularly situated with the plaintiffs,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Indiana entered on July 3, 1973.

OPINION BELOW

The opinion of the Supreme Court of the State of Indiana, Cause No. 1271 S 377, is printed in Appendix A and is reported in 297 N.E. 2d 826.

JURISDICTION

The Judgment of the Supreme Court of the State of Indiana, printed in Appendix A, was entered on July 3,

1973. The Petitioners filed their Petition for Rehearing in a timely manner and that Petition was denied by the Indiana Supreme Court on August 31, 1973. The denial is printed in Appendix B. No request or order for an extension of time within which to petition for certiorari was filed, granted or required.

The jurisdiction of this Court is invoked under 28 USCA 1257 (3).

THE QUESTIONS PRESENTED

1. Must a municipal corporation abandon refuse collection services because it is unable to collect all of the refuse generated by its citizens?

2. Are owners of large commercial apartment buildings entitled to the same refuse collection services as the owner of a single family residence who subleases a portion of his residence?

3. Does the Fourteenth Amendment to the United States Constitution require the Indiana Supreme Court to decide that a municipality which collects the refuse of some of its citizens must collect the refuse of all of its citizens?

4. May a municipal corporation take economic consideration into account in determining the extent to which it will provide refuse collection services funded through general tax revenues?

CONSTITUTIONAL PROVISIONS AND MUNICIPAL ORDINANCES INVOLVED

The provision of the United States Constitution involved is Article XIV, Section 1 of said Constitution.

The provision of the Constitution of the State of Indiana involved is Article I, Section 23 of said Constitution.

The Municipal Ordinance involved is the Municipal Code of Evansville, Indiana, Chapter 933, as amended by Municipal Ordinance G-69-9 which was passed by the Common Council of the City of Evansville on February 17, 1969, and signed into law and approved by the Mayor of the City of Evansville on February 24, 1969.

The provisions of said Constitutions, and Ordinance are printed in Appendix C hereto.

STATEMENT

This was an action brought by Respondents against the Petitioners to have a portion of Evansville Municipal Code Chapter 933 declared unconstitutional and void, for injunctive relief and for an order mandating the City of Evansville, through its officers and official bodies, to institute refuse collection services for the Respondents. Evansville Municipal Ordinance No. G-69-9 amending Chapter 933 did, through its various provisions, define all apartment buildings containing five or more dwelling units as commercial enterprises, and went on to state that the City of Evansville would provide refuse collection services only to residences. The effect of this definition was that the City of Evansville, following the passage of the Ordinance, undertook refuse collection of all single family residences, and apartment buildings containing four or less units, but did not provide refuse collection services for apartment buildings containing five or more units. The significant portions of Chapter 933, as amended, are

933.01 and 933.03 (5) as they appear in Appendix C. In rhetorical paragraph 10 of pleading paragraph I of the Respondents' complaint, they alleged that Evansville Ordinance No. G-69-9 is unconstitutional, unreasonable and void as being arbitrary, capricious and discriminatory, all in violation of Article I, Section 23 of the Constitution of Indiana and Article XIV, Section 1 of the Constitution of the United States. Thereafter, the Petitioners filed their Plea in Abatement and the Respondents filed their Demurrer against the Petitioners' Plea in Abatement and their Motion to Strike the Petitioners' Plea in Abatement. The Respondents' Demurrer was sustained and on June 20, 1969, the Petitioners' Motion to Reconsider the ruling of the Respondents' Demurrer was overruled. On May 6, 1970, the Petitioners filed their Answer and defenses and Motion for Change of Venue from the County. Venue of the case was changed to Warrick County, Indiana, and on December 3, 1970, the Respondents filed a Motion for Summary Judgment as to liability. After a determination that the Respondents constituted a proper class, the Petitioners did on June 4, 1971, file their Motion for Summary Judgment. On July 13, 1971, the Circuit Court of Warrick County entered judgment for the Petitioners on their Motion for Summary Judgment and overruled the Respondents' Motion for Summary Judgment. On September 9, 1971, a Motion to Correct Errors was timely filed by the Respondents. After their Motion to Correct Errors was overruled, the Respondents timely filed their Record of Proceedings and Briefs with the Indiana Supreme Court. Additional Briefs were filed and on May 10, 1972, the Supreme Court notified the parties that the case would be decided without oral argument. On July 3, 1973, the Indiana Supreme Court rendered its opinion, revers-

ing the decision of the Trial Court. The decision of the Indiana Supreme Court is a final and binding decision. The Petitioners timely filed their Petition for Rehearing with the Indiana Supreme Court, and Brief in Support thereof, which was denied by the Indiana Supreme Court on August 31, 1973. The denial is printed in Appendix B.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Indiana has, by its opinion, declared a validly enacted Municipal Ordinance to be in violation of the Equal Protection Clause, Article XIV, Section 1, of the Constitution of the United States of America. Decisions of the United States Supreme Court, which will be cited herein, interpret this Constitutional provision differently, and the ordinance herein questioned is valid under the decisions of the United States Supreme Court. The specific point raised by this Petition for Writ of Certiorari, is whether or not a municipal corporation may make a legislative determination that it will pick up the refuse generated by certain members of the community without picking up all of the refuse generated by the other members of the community, and whether or not there can possibly be a valid justification for such a distinction.

The Indiana Supreme Court did declare this Ordinance to be in violation of Article I, Section 23 of the Constitution of the State of Indiana. The Petitioners would point out, however, that the Indiana Supreme Court in its opinion in this case, said:

> "Therefore, for purposes of equal protection analysis, the two shall be considered synonymous with one another. There are a myriad of Indiana cases

in which the two provisions have been considered in unison." (Appendix A, Page 20.)

The practical effect of that statement is to equate Article I, Section 23, of the Constitution of the State of Indiana, with Article XIV, Section 1 of the Constitution of the United States and to say that the two are synonymous when considering an equal protection issue. Therefore, in this particular instance, the jurisdiction of the United States Supreme Court is not defeated by the fact that the Ordinance herein questioned was also found to be in violation of a provision of the Constitution of the State of Indiana.

A similar case involving the collection of refuse in Chicago, Illinois, is currently pending in the United States Court of Appeals for the Seventh Circuit, the same being *Goldstein, et al. v. City of Chicago, et al.*, Cause No. 72-1965. *Goldstein* is an appeal from the United States District of the Northern District of Illinois, in which a Memorandum of Decision was rendered by the Honorable Philip W. Tone, District Judge. Judge Tone's Memorandum of Decision is printed in Appendix D. The City of Chicago has made a distinction for refuse collection services similar to that made by the City of Evansville, that is, the City of Chicago collects refuse from four unit apartment buildings and does not collect refuse from five unit apartment buildings. The United States Court of Appeals for the Seventh Circuit has not yet rendered a decision in *Goldstein*. However, if the Trial Court is affirmed, there will be a division of authority on this constitutional question within the Seventh Circuit as between the United States Court of Appeals for the Seventh Circuit and the Indiana Supreme Court. Your Petitioners

have no recourse to the Federal Courts since the Indiana Supreme Court has rendered its decision, and their only recourse at this point is to the United States Supreme Court.

A more critical issue is, however, the extent to which a Municipal or State legislative authority may engage in limited discriminatory legislation involving issues that are not "fundamental' and do not involve "suspect classes." With respect to the legislative distinction complained of by the Respondents, the Indiana Supreme Court said,

> "We are unable to discern any rationality in such a distinction." (Appendix A, Page 22.)

Judge Tone, of the United States District Court for the Northern District of Illinois, had no such difficulty. He states that:

> "The obvious implication of the City's reasoning is that certain persons would be unable to afford private removal. Into this category, it has placed, among others, individual home owners. It apparently believes that in addition to those home owners unable to afford such service, others would unduly suffer in their dealings with rubbish collection companies through unequal bargaining powers. On the other hand, the City apparently believes that certain other groups are capable of affording private removal and has thus not chosen to provide free service to them. In this latter category, the City has included owners of apartment buildings, with various exceptions, and, under Defendant's interpretation, owners of condominium living units. In addition to being able to afford such service, the

City apparently believes that since apartment building owners and condominium owner associations have a greater volume of rubbish than individual home owners, the disparity in bargaining power between these groups and rubbish collection companies would be less.

I can not say that such classifications in allocating limited available public funds are totally without a rational basis. It could, of course, be argued that the classifications are overly broad. Overbreadth, however, is not a basis for attack upon a classification in the social welfare or economic realm." (Appendix D, Page 42.)

The City of Evansville was engaging in a legitimate exercise of legislative discretion in the social welfare or economic realm when it passed the Ordinance providing refuse collection to residences and not apartments with five or more units. There is a basic difference between a home owner who rents out a sleeping room, and a corporate owner of a two hundred (200) unit apartment complex. The methods and character of their businesses are different and their economic considerations are different.

Legislative classification on the basis of the type and purpose of activity has long been held valid. In *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 53 S. Ct. 481, 77 L Ed 929 (1933), the United States Supreme Court said,

"Whatever may be said of individual similarities and differences between chain store operations and the conduct of a single shop or a department store, the former employ distinguishable methods of conducting businesses and the legislature may make the

> difference in method and character of the business the basis of classification . . ." (for taxation).

If we would replace the phrase "chain store" with "apartment complex" and replace "single store" and "department store" with "single room," or "second floor," we would have a correct statement of law to apply to the instant case.

If the methods of conducting business are distinguishable, then that distinction can be used as the basis of legitimate legislative classification. The *Liggett* case involved taxpayers who owned chain stores with five or more separate outlets. Here again, the distinction between a five unit businss operation and a four unit business operation was found to be valid based upon business purposes. These principles apply equally well to the case now before this Court.

That being the case, Indiana Supreme Court is correct in citing *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1948, 29 L. Ed. 2d 534 (1971), which says that the equal protection clause does not prevent a state or municipality from indulging in reasonable legislative classification. However, the error made by the Indiana Supreme Court, is in applying the wrong test of reasonableness. They state:

> "The question to be asked in this case, then, is whether 'any state of facts rationally justifying it (the ordinance) is demonstrated to or perceived by the court' *United States v. Maryland Savings-Share Ins. Corp.*", 400 U.S. 4, 91 S. Ct. 16, 27 L Ed. 2d 4 (1970). (Appendix A, Page 22.)

The true test of reasonableness is more accurately put by the United States Suprme Court in *McGowan v.*

Maryland, 366 U.S. 420, 81 S. Ct. 1101, 16 L. Ed. 2d 393, 399 (1961).

> "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

McGowan, supra, requires the Court to attempt to conceive of any facts that might justify the statutory discrimination. Judge Tone has done this in the *Goldstein* case, but the Indiana Supreme Court has apparently made no attempt to conceive of any justifying facts. It might be pointed out that the instant case was decided on Motions for Summary Judgment filed by both sides, and there was no attempt by either side to demonstrate such facts. In this situation it is even more incumbent upon the Appellate Tribunal to attempt to conceive of facts to uphold the presumption of legislative validity. The validity of this type of an ordinance is crucial to communities which recognize that a refuse disposal problem exists but who are unable to attack the entire problem. As this Court said in *Jefferson v. Hackney*, 406 U.S. 535, 296, 92 S. Ct. 549, 32 L. Ed. 2d 285 (1972):

> "A legislature may address a problem 'one step at a time', or even 'select one phase of one field and apply a remedy there, neglecting others,' *Williamson v. Lee Optical Co.* 348 U.S. 483, 489, 75 S. Ct. 461, 99 L. Ed. 2d 563 (1955)."

The Indiana Supreme Court, in its opinion, agreed that:

> "In the case at bar, there is no fundamental right at

stake, nor is there any suspect class involved." (Appendix A, Page 22.)

Having recognized this, they should have applied the lesson expounded by this Court in *San Antonio School District v. Rodriguez*, ____U.S.____ 93 S. Ct.____ 36 L. Ed. 2d 16, 43, (1973):

"The lesson of these cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."

Continuing at 36 L. Ed 2d 16, 48, the Court said:

"In such a complex arena in which no perfect alternatives exist. the Court does well not to impose too rigorous a standard of scrutiny less all local fiscal schemes become subjects of criticism under the Equal Protection Clause."

The *San Antonio School District* case involved a school financing method used in the State of Texas and alleged to be discriminatory. The case which the Petitioners bring to this Court's attention involves the financing of refuse collection. Certainly refuse collection does not hold as high a place in our social scheme of things as education.

The thrust of the Indiana Supreme Court's decision is that the legislative distinction between four unit apartments and five unit apartments is arbitrary and without rational basis. That leaves the City of Evansville in the unenviable position of having to choose whether or not it will collect refuse from any commer-

cial establishment. The Indiana Supreme Court has gone on to define all rental activities as commercial and say that in the event that the Petitioner chooses to collect any commercial refuse, then it must collect all commercial refuse to avoid discrimination and thus unequal protection of the laws. The legal effect of this reasoning is that if the City collects refuse from a single family dwelling leased by its owner to another occupant, which is commercial activity as defined by the Indiana Supreme Court, then it must collect all commercial refuse which would include restaurants, motels, nursing homes, large apartment complexes, and others, including perhaps even industrial refuse. The Equal Protection Clause cases decided by this Court are not that far-reaching. In *City of New York v. Richardson, 473* F. 2d 923 (2nd Cir., 1973) the City of New York brought suit as a result of what it felt to be discriminatory legislation arising out of an unequal return of Federal benefits to it in proportion to the amount of tax money it contributed. The Court said, at Page 928:

> "We are fully aware that metropolitan communities, faced with rising costs of local services and declining tax bases, are experiencing severe fiscal overburdening. But it seems clear that the imagination to devise a proper remedy for most of these urban ills must come from the legislative and not the judicial branch of government."

This quotation describes exactly what the Petitioners attempted to do. They attempted to use their imagination to devise a proper remedy for the refuse collection problem, and the judicial branch of the government of the State of Indiana, not being able to perceive any

rational basis for the distinction made by the Municipal Ordinance, has thwarted the Petitioners' attempt to deal with their own problems.

The distinction between four unit apartments and five unit apartments for other purposes has been recognized. 42 USCA 3603 and 42 USCA 3604 constitute portions of the Federal Fair Housing Act. The provisions of 42 USCA 3604, which outlaw discrimination in housing, do not apply to those dwellings which are exempted under 42 USCA 3603 (b)(2). That particular exemption applies to:

> "(2) Rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence."

Discrimination on the basis of race, color, religion or national origin is certainly a more invidious discrimination than the type complained of by the Respondents. Decisions of this Court too numerous to mention have referred to such discrimination as involving fundamental rights or a suspect class. This principle is recognized by the Indiana Supreme Court in its opinion in the instant case, and they quite properly cite several decisions of the United States Supreme Court in support of that proposition. However, if the United States Congress has exempted four unit apartments from the application of the Federal Fair Housing Act, is not the City of Evansville within its right to make a legislative classification on the same basis involving a social and economic welfare scheme rather than a fundamental right or suspect class?

In the case of *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), the Supreme Court considered federal aid to dependent children. The State of Maryland had a statutory benefit formula which did not increase on a per family basis, even though additional children were born into the family once the maximum benefit was reached. This Court upheld these statutes as not being discriminatory against large families, or children born into large families. This Court made a statement of law which is particularly appropriate to this case:

> "In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' . . . 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific'." 397 U.S., at 485.

In this case, the benefit involved is far less fundamental than that in issue in *Dandridge*.

It is a matter of public knowledge that environmental concerns increasingly permeate the considerations on which day-to-day governmental decisions are based. Waste collection and disposal is an increasingly serious problem. New considerations, many of them environmental, are constantly being raised to influence the collection and disposal of refuse. Municipal corporations should be allowed the legislative discretion

of doing as much as they can to solve this problem. The Indiana Supreme Court's decision, that the ordinance in question is unconstitutional as discriminatory legislation, has placed the City of Evansville in a position of not being able to do as much as it can do because it can not do as much as is required of it under this decision. If in collecting refuse from some rental units, the City of Evansville is thereby required to collect refuse from all commercial enterprises, then it must consider eliminating refuse collection services from all rental and commercial units, since the alternative is prohibitively expensive. This question is a serious one. In Chicago, as already recited, and in other communities throughout the Country, the rights of the communities to deal with this problem in the manner which is best for them on an inidividual basis should be preserved.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Ceriorari should be granted.

JOHN C. COX
TIMOTHY R. DODD
16 N.W. Sixth Street
Evansville, Indiana 47708
Attorneys for Petitioners

THEODORE LOCKYEAR
555 Sycamore Street
Evansville, Indiana 47708
Of Counsel for Petitioners

APPENDIX A

OPINION BELOW

IN THE
SUPREME COURT OF INDIANA

VETRIS C. MILLER, ET AL.,	)	
STATE OF INDIANA ON THE RELATION OF VETRIS C. MILLER, ET AL., *Appellants,*	)	
v.	)	No. 1271 S 377
FRANK F. McDONALD, as Mayor of the City of Evansville, Indiana, CITY OF EVANSVILLE, INDIANA, ET AL., *Appellees.*	)	

APPEAL FROM THE WARRICK CIRCUIT COURT THE HONORABLE ADDISON M. BEAVERS, JUDGE

HUNTER, J.

This is an appeal by Vetris C. Miller and others similarly situated (plaintiffs below) from an adverse summary judgment entered in the Warrick Circuit Court on July 13, 1971. Appellants, subsequent to judgment, filed a motion to correct errors, which was overruled on November 8, 1971, resulting in this appeal. Jurisdiction to entertain this appeal is based on IC 1971, 33-3-

2-7 (Ind. Ann. Stat. §4-214 [1961 Repl.]) which was in force at the time the appeal was effected.

The record discloses the following facts and proceedings:

Prior to February 24, 1969, the Municipal Code of Evansville, Chapter 933, provided for the Board of Public Works to collect refuse from all dwelling and apartment houses as a city service.[1] On February 17, 1969, Chapter 933 was amended to limit collection services to all dwelling houses and to apartment complexes containing four or less units.[2] Apartment buildings with more than four units are deemed to be "commercial enterprises" and hence, outside the ambit of the ordinance.

Plaintiff-apartment-owners brought this class action against the City of Evansville, alleging (as they do on appeal), *inter alia*, that the ordinance, as amended offends the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 23, of the Indiana Constitution. That particular section of plaintiff's complaint is set out below:

> "That Section 933.03, subparagraph (5) of Ordinance No. G-69-9, which defines an apartment building exceeding four dwelling units as a commercial enterprise and excluding such apartments from household refuse collection service to be furnished by the City, is unconstitutional, unreasonable and void as being arbitrary, capricious and discriminatory as to the plaintiffs and the class they represent, being all persons owning apartment buildings with

more than four dwelling units located therein, and in violation of Article 1, Section 23, of the Constitution of Indiana and Article 14, Section 1, of the Constitution of the United States, which provisions read as follows:

"Article 1, Section 23, of the Constitution of Indiana:

" '§23. Privileges equal. — The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens. '

"Article 14, Section 1, of the Constitution of the United States:

" '§1, Citizenship — Due Process of Law—Equal Protection. — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"that said Ordinance No. G-69-9 is unreasonable, arbitrary, capricious, discriminatory, illegal and void as applied to the classification of apartment buildings containing four or more dwelling units because such classification is arbitrary and artificial in that said classification is not based on substantial distinctions with reference to the subject matter, and is arbitrary and artificial in that it does not em-

brace all parties naturally and inherently within the class of persons who generate household refuse; that the household refuse as defined in Ordinance No. G-69-9, which is generated by persons living in single dwelling units and persons living in apartment buildings with four or less dwelling units is identical with the household refuse generated in apartment buildings containing five, six or more dwelling units in any such building; that the plaintiffs' apartments and the apartments of the members of the class they represent herein are all zoned as residential and not as commercial enterprises; that the defendant City's Department of Waterworks and the utilities companies also classify said apartments as non-commercial; that by reason of the aforesaid Ordinance No. G-69-9 is unconstitutional, void and in violation of the constitutional rights of the plaintiffs herein and the persons in the class represented by them."

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Article 1, Section 23, of the Constitution of the State of Indiana embodies essentially the same spirit as its federal counterpart:

"The General Assembly shall not grant to any citizen, or classes of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Therefore, for purposes of equal protection analysis, the two shall be considered synonymous with one another. There are a myriad of Indiana cases in which the two provisions have been considered in unison.

In order to attack alleged discriminatory action on equal protection grounds, the alleged act or acts must be perpetrated by the state or an agency thereof. It has been held that municipal ordinances, passed pursuant to state enabling legislation, is state action as contemplated by the Fourteenth Amendment. *Lovell v. Griffin*, (1937) 303 U.S. 444, 58 S. Ct. 666. In the case at bar, we are confronted with a municipal ordinance authorized by state law. (IC 1971, 19-2-1-1, *et seq.*; Ind. Ann. Stat. §48-4245, *et seq.* [1963 Repl.]). The greater question, of course, is whether that ordinance invidiously discriminates against a particular group of people, namely those people in Evansville owning apartment buildings of five or more units.

The Equal Protection Clause does not prevent a state or municipality from indulging in *reasonable* legislative classification. *Graham v. Richardson* (1971), 403 U.S. 365, 91 S. Ct. 1848. Generally speaking, if a classification is shown to have any rational or reasonable basis, it will be sustained. *Graham, supra; United States v. Maryland Savings-Share Ins. Corp.* (1970), 400 U.S. 4, 91 S. Ct. 16. Normally, the enactment is presumed to be valid; the burden being on the party challenging its validity to overcome such presumption. *Graham, supra; San Antonio Independent School District v. Rodriguez* (1973), 41 Law Week 4407.

There are instances in which the rational basis formulation is inadequate and a stricter standard of judicial scrutiny is required. If fundamental rights or "suspect" classes are involved, the State and not the complainants must shoulder a "heavy burden of justification" by proving a compelling state interest and a *necessary* relation between that interest and the classifi-

cation in question. *Rodriguez, supra; Bullock v. Carter* (1972), 92 S. Ct. 849; *Graham, supra; Turner v. Fouche* (1970), 396 U.S. 346, 90 S. Ct. 532; *Shapiro v. Thompson* (1960), 394 U. S. 618, 89 S. Ct. 1322.

In the case at bar, there is no fundamental right at stake, nor is there any suspect class involved. The question to be asked in this case, then, is whether "any state of facts rationally justifying it (the ordinance) *is demonstrated to or perceived by the courts.*" *United States v. Maryland Savings-Share Ins. Corp., supra.*

Chapter 933 of the Municipal Code of Evansville, as amended, establishes two basic classifications. First, a distinction is drawn between apartment houses of four or less units and apartment houses of five or more units. Apartment houses of four or less units are eligible for the city pick-up service, while larger apartment complexes are deemed to be commercial and, therefore, not entitled to the public service. We are unable to discern any rationality in such a distinction.

Black's Law Dictionary (4th Edition) defines "commerce" as "(t)he exchange of goods, productions, or property of any kind" and "commercial" as that which is related or connected with commerce in general. The renting of living space is clearly a "commercial enterprise"; the landlord provides shelter and services in exchange for rent. Is a two or three or four-unit apartment complex any less a "commercial enterprise" than a ten-unit apartment complex? Obviously, the *quantity* of goods and services being exchanged varies with the number of units in the building, but the *nature* of the relationship remains the same.

We believe Ordinance 933, as amended, *transparently* distinguishes between commercial and noncommercial enterprises. Such a classification is arbitrary and devoid of any apparent rationality. The ordinance applies a double standard to those who, in reality, are in the same class without any reasonable justification. Therefore, the commercial-noncommercial distinction, as delineated by the ordinance, denies similarly situated persons equal protection of the laws.

Chapter 933.01, as amended, provides for the collection and disposal of all "household refuse" "on or about the premises of *all residential dwelling units, apartment houses as defined herein or other private or public structures or buildings in the City* . . ." (Emphasis added.) "Household refuse" is defined by 933.03, as amended, as follows:

> "1. HOUSEHOLD REFUSE — the term 'household refuse' shall mean all kitchen wastes, including cans, bottles, household food, accumulations of animal food and vegetable matter attendant to the preparation, use, cooking and serving of foods. It shall also include ashes, empty cartons, crates, boxes, wrapping materials, newspapers and magazines, cloth materials, discarded toys, discarded clothing and similar materials when placed in a standard container or in the bundle defined herein."

Here, once again, the ordinance draws a constitutionally impermissible distinction. The ordinance, *on its face*, distinguishes between apartment houses of five or more units and "other private or public structures or buildings" generating "household refuse." The disposal service is denied to apartment houses of five or more

units on grounds that such dwellings are "commercial enterprises." But what are these "other private or public structures or buildings?" They surely are not "residential dwelling units" or "apartment houses as defined herein." What "other private or public structures or buildings" do, in fact, generate "household refuse" as defined by the ordinance? Restaurants do. Hotel do. Rooming houses do. Are these not "commercial enterprises?" Why, then, should these "commercial enterprises" be treated any differently than apartment houses with five or more units? Once again, the ordinance treats those similarly situated in a dissimilar fashion. We cannot conceive of any set of facts which could reasonably justify such a classification.

For all the foregoing reasons, we hold that Chapter 933 of the Municipal Code of Evansville is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 23, of the Constitution of the State of Indiana.

We, therefore, reverse and remand this cause to the trial court for further proceedings not inconsistent with this opinion.

Judgment reversed.

DeBruler and Prentice, JJ., concur. Givan, J., concurs in result. Aterburn, C.J., dissents without opinion.

1. "933.01 BOARD TO PROVIDE FOR COLLECTION AND DISPOSAL.

The Board of Public Works is authorized and empowered to provide for the collection and disposal of all garbage, ashes, trash and waste materials, which accumulate from time to time on or about the premises of all dwelling houses, apartment houses or other private or public structures or buildings in the City and to acquire such equipment, vehicles, containers and employ such personnel as may be necessary and required therefor."

2. The pertinent sections read as follows:
"933.01 BOARD TO PROVIDE FOR COLLECTION AND DISPOSAL.

The Board of Public Works is authorized and empowered to provide for the collection and disposal of all household refuse, which accumulates from time to time on or about the premises of all residential dwelling units, *apartment houses as defined herein* or other private or public structures or buildings in the City, and to acquire such equipment, vehicles, containers and employ such personnel as may be necessary and required therefor. The Board may also, pursuant to the power vested in them by the Statutes of the State of Indiana, contract for such services."

"5. APARTMENT BUILDING—The term 'apartment building' as used in this chapter shall not exceed four dwelling units in said building. Apartment buildings exceeding four dwelling units shall be considered as commercial enterprises."

APPENDIX B

ORDER DENYING PETITIONERS' PETITION FOR REHEARING IN THE INDIANA SUPREME COURT

STATE OF INDIANA (SEAL)
INDIANAPOLIS, 46204
Telephone 633-5200

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS

Billie R. McCullough, Clerk
217 State House

No. 1271S377

Vetris C. Miller, ets al V. Frank F. McDonald

You are hereby notified that the Indiana Supreme Court has on this day Denied Appellees Petition for rehearing without Opinion.

Hunter, C. J. (Acting)

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and seal of said Court, this 31st day of August, 1973.

Billie R. McCullough
Clerk Supreme Court and Court of Appeals

APPENDIX C

I. UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

Article 14, Section 1, of the Constitution of the United States.

"§1. Citizenship—Due Process of Law—Equal Protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

II. INDIANA CONSTITUTIONAL PROVISIONS INVOLVED

"Article 1, Section 23, of the Constitution of Indiana:

"'§23.. Privileges equal.—The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.'

III. CHAPTER 933 OF THE MUNICIPAL CODE OF THE CITY OF EVANSVILLE, INDIANA, AS AMENDED BY ORDINANCE G-69-9.

CHAPTER 933

Garbage and Rubbish; Public Dumps

933.01 Board to provide for collection and disposal.
933.02 Board to fix times for collection.
933.03 Definitions.
933.04 Container regulations; ash pits.
933.05 Establishment of public dumps.
933.06 Transporting and depositing of waste materials.
933.07 Supervision and control of dumps; attendant.
933.08 Permit required for sorting junk; fires.
933.09 Permit required for trash collectors.
933.10 Exceptions.
933.99 Penalty.

CROSS REFERENCES

Hauling loose material through streets—see GEN. OFF. 537.02

Littering streets—see GEN. OFF. 537.14 et seq.

Rubbish in parks—see S. & P. S. 935.10

Dumping garbage in Ohio River—see S. & P. S. 939.03

Rubbish and garbage disposal at dwelling units—see HLTH. & SAN. 1717.07

933.01 BOARD TO PROVIDE FOR COLLECTION AND DISPOSAL.

The Board of Public Works is authorized and empowered to provide for the collection and disposal of all household refuse, which accumulates from time to time on or about the premises of all residential dwelling

units, apartment houses as defined herein or other private or public structures or buildings in the City, and to acquire such equipment, vehicles, containers and employ such personnel as may be necessary and required therefore. The Board may also, pursuant to the power vested in them by the Statutes of the State of Indiana, contract for such services. (G-69-9)

933.02 BOARD TO FIX TIMES FOR COLLECTION.

The Board of Public Works is authorized to fix the hours or days of the week for such collections and from time to time to adopt such regulations not inconsistent with this chapter as may be required for the collection and disposal of such household refuse. (G-69-9)

933.03 DEFINITIONS.

For purposes of this chapter, the following definitions shall apply:

1. HOUSEHOLD REFUSE—The term "household refuse" shall mean all kitchen wastes, including cans, bottles, household food, accumulations of animal food and vegetable matter attendant to the preparation, use, cooking and serving of foods. It shall also include ashes, empty cartons, crates, boxes, wrapping materials, newspapers and magazines, cloth materials, discarded toys, discarded clothing and similar materials when placed in a standard container or in the bundle defined herein.

2. STANDARD CONTAINER—The term "standard container" shall mean a leakproof container with side handles and tight lid of 20 gallon capacity.

3. RESIDENTIAL DWELLING UNIT—The term "residential dwelling unit" shall mean a building or a

portion thereof, designed for and occupied by one family for living and sleeping purposes with kitchen facilities for the exclusive use of the one family.

4. BUNDLE—The term "bundle" as used herein is defined as being equivalent to one "standard container" and shall consist of brush, hedge and tree trimmings, cardboard, paper, wood, yard refuse materials, including grass clippings, weeds, which items are securely tied in bundles. The bundles shall be securely tied near each end and shall not exceed four (4) feet in length, two (2) feet in diameter, nor weigh more than sixty (60) pounds, and no individual branch shall exceed three (3) inches in diameter. A limit of one (1) bundle will be collected each scheduled collection day as a substitute for one "standard container."

5. APARTMENT BUILDING—The term "apartment building" as used in this chapter shall not exceed four dwelling units in said building. Apartment buildings exceeding four dwelling units shall be considered as commercial enterprises. (G-69-9)

933.04 CONTAINER REGULATIONS; ASH PITS.

(a) The occupying owner or occupying tenant of any dwelling unit, apartment house, building or structure, for which provision is made for the collection of household refuse at public expense, shall provide such dwelling unit, apartment house, building or structure with three standard containers as defined in this chapter. Each occupying owner or occupying tenant of each dwelling unit shall cause to be placed at the curb or at the alley location, the standard containers or standard container and bundle, and all apartment units to be collected shall place their containers or containers and

bundle in one location for each such apartment building.

(b) Unless such occupying owner or occupying tenant supplies any such dwelling unit, apartment house, building or structure with such standard containers, as required by this chapter, and deposits household refuse in such containers, and maintains such containers at the location on the premises as hereinbefore set out, then the Board of Public Works shall not be required to collect or to cause to be collected, removed and disposed of, such household refuse from such premises.

(c) Any occupying owner or occupying tenant who now has and maintains on his premises a stationary ash pit, constructed of concrete or brick, and maintained in accordance with the sanitary and safety laws of the State and the sanitary and safety ordinances of the City, shall at no time deposit or place household food, accumulations of animal food or vegetable matter attendant to the preparation, use, cooking and serving of foods, cans, or bottles, in such ash pit. The depositing or placing of such materials in such ash pits shall be a violation of this chapter. (G-69-9)

933.05 ESTABLISHMENT OF PUBLIC DUMPS.

The Board of Public Works is authorized and empowered to lease and rent and renew and re-lease from time to time real estate within or without the corporate limits, suitable and conveniently located for the establishment of public dumps, and to make from time to time such regulations for the control and use of such public dumps as may be necessary and proper with due regard for the health, sightliness and cleanliness of the City, and for the regulation and control of such public

dumps not inconsistent, however, with the provisions of this chapter.

933.06 TRANSPORTING AND DEPOSITING WASTE MATERIALS—APPROVAL OF PRIVATELY-OWNED DUMPS—DELIVERY OF WASTE MATERIALS ONLY TO APPROVED DUMPS—SUSPENSION OR REVOCATION—EXCEPTION—LICENSE FEES.

(a) No person shall haul, transport or convey, or cause to be hauled, transported or conveyed, any trash, ashes, rubbish, refuse, junk or other discarded or waste materials, and deposit, place or dump the same upon any public property, street or thoroughfare or upon any privately-owned property, excepting on public dumps established by the Board of Public Works under this chapter, within the city or within four (4) miles of the corporate limits and within the State of Indiana or except in properly approved private dumps as hereinafter set forth.

(b) The Board of Public Works is authorized and empowered to approve privately-owned dumps for the disposal of trash, ashes, rubbish, refuse, junk or other discarded or waste materials upon application being made to said Board of Public Works and for purposes of such approval the Board of Public Works shall have jurisdiction within four (4) miles of the corporate limits of the City of Evansville within the State of Indiana. The applicant for approval of a privately-owned dump site shall make application to the Evansville-Vanderburgh County Department of Health and upon payment of the sum of one hundred dollars ($100.00) to said Health Department, which sum shall be depos-

ited in the General Fund of the City of Evansville, the said Health Department shall make a physical inspection of the proposed site and the proposed method of operation. If the Health Department approves of the proposed dump site and the proposed method of operation, then such approval shall be certified to the Board of Public Works who shall thereupon issue a permit for said privately-owned dump site which permit will not be suspended or revoked except for cause. Failure of the privately-owned dump site to conform to the rules and regulations of the Board of Public Works relative to such operations or to the minimum standards established by the Evansville-Vanderburgh County Department of Health and applicable standards of the State of Indiana, when certified to the attention of the Board of Public Works shall be cause for suspension or revocation of said permit. The permit described herein shall be renewed each year upon its anniversary and the fee for each subsequent renewal shall be one hundred dollars ($100.00) which shall be deposited in the General Fund of the City of Evansville.

(c) Nothing in this chapter shall be construed to prohibit the dumping or depositing of dirt, sand, gravel, and the compound commonly known as "fly ash", concrete rubble or similar materials. Said substances to be free of all trash, rubbish, or refuse materials of all kind, upon any lot either public or privately owned, at the request of the owner, for the purpose of elevating the grade of such lot or the unimproved part of such lot. (G-68-4)

933.07 SUPERVISION AND CONTROL OF DUMPS; ATTENDANT.

The Board of Public Works shall at all times exer-

cise supervision and control over all dumps, public or privately owned and approved hereunder, within four (4) miles of the City of Evansville and within the State of Indiana and in the case of public dumps shall fix convenient hours during each week day, excepting Sunday and legal holidays, at which time the public dumps may be used by the public, and shall post conspicuously at the entrance to each dump such regulations as the Board may from time to time adopt, regulating the use thereof. No person shall violate any such regulations of the Board so posted for the regulation and control of the public dumps. The Board may require that any privately owned or public dump have an individual in constant attendance at said dump to insure the proper use of said dump in compliance with any rules or regulations to be established by the Board of Public Works regulating such dumps and said Board is hereby authorized to prepare regulations not inconsistent with this chapter for the regulation of such dumps. (G-68-4)

933.08 PERMIT REQUIRED FOR SORTING JUNK; FIRES.

No person shall go upon any public dump, established and operated under the provisions of this chapter, for the purpose of sorting rags, tin cans, paper, junk or any other materials without a permit in writing of the Board of Public Works. No person shall set or start a fire upon any public dump at any time.

933.09 PERMIT REQUIRED FOR TRASH COLLECTORS—DEPOSIT ONLY IN APPROVED DUMPS—LICENSE FEES.

(a) No person, privately engaged in the business or practice of collecting garbage, trash, ashes or waste

materials from the property of another, shall engage in such business or practice without first obtaining a permit therefor as provided in this section. Such permit shall be issued upon application by, and in the discretion of, the Board of Public Works, which for cause may suspend or revoke any such permit. Before the Board of Public Works is authorized to issue a permit, as set forth in this section, the vehicle or vehicles to be used in such collection business shall be exhibited to the Sanitation officer of the Evansville-Vanderburgh County Board of Public Health who shall examine such vehicle and if found to comply with existing health and sanitation requirements of the City of Evansville and the State of Indiana he shall issue an approval of such vehicle which approval must be submitted to the Board of Public Works and a copy thereof shall be retained by said Board of Public Works at all times in their records. The approval of the Board of Public Works, as set forth in this section, and the approval of the Evansville-Vanderburgh County Health Department as to the vehicle or vehicles to be used shall be issued for a period of one year and such vehicle shall at all times be maintained in a condition equal to the minimum standards established by the Evansville-Vanderburgh County Health Department for such vehicle or vehicles. That the applicant for said permit shall pay to the Board of Public Works the annual sum of ten dollars ($10.00) for each such vehicle which sum shall be deposited in the General Fund of the City of Evansville and the Controller of the City of Evansville shall issue and is hereby authorized to issue an appropriate metal tag for the year 1968 said metal tag to be affixed to the body of the vehicle at the rear thereof and in a conspicuous location thereon and thereafter to issue a metal plate the design, shape and description of said

plate to be determined by the Controller for the year 1969 and each year thereafter. That said permit may be suspended or revoked by the Board of Public Works upon the failure of any such vehicle to at any time meet the minimum standards herein established.

(b) The Board is authorized to adopt regulations regulating the issuance of such permits defining and restricting the territorial areas in which the permittee may operate, the kind and character of the conveyance used, the manner and method of collection and such other rules and regulations not inconsistent with the provisions of this chapter. The Board shall maintain a record of all such permits issued by it and all permittees shall conspicuously display a copy of the permit on such vehicle used, as in Subparagraph (a) hereof described. The violation of any such regulation shall be cause for suspension or revocation of any permit or permits granted hereunder for the use of said vehicle or vehicles.

(c) Any such person collecting garbage, trash, ashes or waste materials as set forth in this section shall deposit such materials in either a public dump maintained and operated by the Board of Public Works or in a private dump approved under this chapter and any violation of this requirement shall be cause for suspension or revocation of such collection permit. (G-68-4)

933.10 EXCEPTIONS.

Nothing contained in this chapter shall be construed or interpreted as authorizing or requiring, at public expense, such collection and disposal of waste material as shall result from the operation of any manufacturing, processing or commercial concern or business.

933.99 PENALTY.

Any person violating the provisions of this chapter shall be fined not more than three hundred dollars ($300.00) and costs, or imprisoned not more than one hundred eighty days, or both, for each offense.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SAMUEL GOLDSMITH and CHICAGO TITLE & TRUST COMPANY, AS TRUSTEE — TRUST, #53416

Plaintiffs,

v.

THE CITY OF CHICAGO, ILLINOIS, a municipal corporation; RICHARD J. DALEY, Mayor of the City of Chicago, Illinois; JAMES J. McDONOUGH, Commissioner of Streets and Sanitation in charge of the Department of Streets and Sanitation of the City of Chicago, Illinois; THEODORE C. EPPIG, Deputy Commissioner of Sanitation in Charge of the Bureau of Sanitation in the City of Chicago, Illinois; and BERNARD J. KORZEN, County Treasurer of Cook County, Illinois,

Defendants,

No. 72 C 722

MEMORANDUM OF DECISION

PHILIP W. TONE, District Judge.

Plaintiff condominium owners allege that they are denied federal rights because, unlike other owners of single family dwellings, they must have their garbage removed at their own expense. Named as defendants are the City of Chicago and certain of its officers and the County Treasurer. Plaintiffs allege a cause of action under the Civil Rights Act, 42 U.S.C. § 1983, and the Fourteenth Amendment and jurisdiction under 28 U.S.C. § 1331, 1343, 2201 and 2202. They purport to sue on behaf of a class.

Plaintiffs contend that under a proper interpretation of the city's ordinance on refuse collection they are not required to remove their garbage at their own expense but are among those entitled to have their garbage collected by the city. Others so entitled under the ordinance have their garbage collected, plaintiffs say, and the failure to do the same for condominium owners denies them equal protection and due process. The County Treasurer is joined because, it is alleged, he has collected and retained from condominium owners a fund consisting of tax moneys that should have been allocated to the collection of their garbage.

Plaintiffs' argument depends upon their interpretation of the ordinance. They do not contend that the ordinance itself discrimnates against them but rather that the city officials deny them a service which the ordinance says they are to receive. The provision of the Municipal Code of Chicago that describes the classes of dwelling that are not entitled to garbage removal

by the city is Section 99—18, which provides in pertinent part as follows:

> "Except in a case of a multiple dwelling containing less than five living units, a multiple dwelling producing less than thirty-two gallons of refuse per week, or a multiple dwelling each living unit of which is individually heated by the tenant, it shall be the duty of the owner of every multiple dwelling to cause to be removed at his own cost and expense at least once each week all refuse produced therein."

Plaintiffs contend they are not within this provision because they are not owners of multiple dwellings, each apartment in a condominium being separately owned. Defendants assert that the condominium building is a multiple dwelling and that the owners of the apartments, who have undivided interests in the common portions of the building, are the owners of that multiple dwelling.

The determination of the issue presented depends entirely on a question of state law, *i.e.*, the interpretation of the ordinance. If defendants' interpretation is correct, as it would seem to me to be if I were a state judge presented with the issue, plaintiffs state no cause of action, for they do not, even alternatively, attack the validity of the ordinance. Even if plaintiffs' interpretation were correct and defendant officers were thus violating implicit affirmative duties with respect to plaintiffs, that violation would not give rise to a federal cause of action. Failure to follow a state statute does not, of itself, constitute a violation of a federally protected right. *See, Bradford Township v. Illinois State Toll Highway Authority*, ____F. 2d____, ____

(7th Cir. June 22, 1972). Plaintiffs proper course is to seek a writ of mandamus in the state court.

Moreover, even construing the complaint as an attack upon the constitutional validity of the ordinance as interpreted by defendants, plaintiffs' statement to the contrary notwithstanding, I find no violation of the equal protection clause of the Fourteenth Amendment.

There is of course present here a classification. But not every classification is impermissible. To determine whether the classification is permissible we must first look to the type of interest with which it deals.

In the present case the governmental service involved is certainly not a fundamental right. Rather it is one of numerous social welfare benefits which governmental units have voluntarily undertaken to provide. In *Dandridge v. Williams*, 397 U.S. 471 (1970) the Supreme Court stated that the standard to be applied when examining a classification with regard to another social welfare benefit—federal aid to families with dependant children—was whether it bore a rational relationship to a legitimate state interest.

In support of their motion to dismiss, the defendants argue that the classifications as to persons who are and are not furnished free garbage removal service can be justified in terms of the city's legitimate interest in protecting the health and welfare of its citizens through insuring that proper sanitation procedures are complied with. The defendants assert that the city, believing it to be impractical to require all persons to dispose of their rubbish at their own expense, has undertaken to provide removal service to those upon

whom it believes the burden of private removal would be too great.

The obvious implication of the city's reasoning is that certain persons would be unable to afford private removal. Into this category it has placed, among others, individual home owners. It apparently believes that in addition to those home owners unable to afford such service, others would unduly suffer in their dealings with rubbish collection companies through unequal bargaining power.

On the other hand, the city apparently believes that certain other groups are capable of affording private removal and has thus not chosen to provide free service to them. In this latter category the city has included owners of apartment buildings, with various exceptions, and, under defendants interpretation, owners of condominium living units. In addition to being able to afford such service, the city apparently believes that since apartment building owners and condominium owner associations have a greater volume of rubbish than individual home owners, the disparity in bargaining power between these groups and rubbish collection companies would be less.

I cannot say that such classifications in allocating limited available public funds are totally without a rational basis. It could of course be argued that the classifications are overly broad. Overbreadth, however, is not a basis for attack upon a classification in the social welfare or economic realm. As the Court stated in *Dandridge v. Williams, supra:*

"In the area of economics and social welfare, a state

> does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' . . . 'the problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' " 397 U.S. at 485.

In the present case the benefit involved is far less fundamental than that in issue in *Dandridge*.

Plaintiffs' complaint is accordingly dismissed for failure to state a claim upon which relief can be granted.

United States District Judge
Phillip W. Tone

Dated: September 28, 1972

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-845

FRANK F. McDONALD, as Mayor of the City of Evansville,
CITY OF EVANSVILLE, INDIANA, et al,
Petitioners,

vs.

VETRIS C. MILLER, et al,
STATE OF INDIANA on the relation of Vetris C. Miller, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF OF RESPONDENTS IN OPPOSITION

HARRY P. DEES
ALAN N. SHOVERS
305 Union Federal Building
Evansville, Indiana 47708
Attorneys for Respondents

KAHN, DEES, DONOVAN & KAHN
305 Union Federal Building
Evansville, Indiana 47708
Telephone: 812/423-3183
Of Counsel for Respondents

UNIGRAPHIC, INC. 4100 JEFFERSON AVE. EVANSVILLE, IND. 47715

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Chapter 933 of the Municipal Code of Evansville, Indiana, as amended by Municipal Ordinance No. G-69-9 3-4-8

Supreme Court Rules:

19 1 (a) 5
19 1 (b) 7

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-845

FRANK F. McDONALD, as Mayor of the City of Evansville, Indiana
CITY OF EVANSVILLE, INDIANA
COMMON COUNCIL OF THE CITY OF EVANSVILLE, INDIANA
THOMAS L. OSSENBERG, REBECCA RATCLIFFE, JAMES H. SWONDER, JOHN M. CALDWELL, DAVID A. KOEHLER, BENJAMIN H. EVANS, JAMES F. ATHERTON, WILLIAM L. BROOKS, JAMES J. HELFRICH, as Members of and constituting the Common Council of the City of Evansville, Indiana
BOARD OF PUBLIC WORKS OF THE CITY OF EVANSVILLE, INDIANA
LOUIS IACCARINO, DOLPH VANDEVEER, A. S. PURDIE, as Members of and constituting the Board of Public Works of the City of Evansville, Indiana

Petitioners

vs.

VETRIS C. MILLER, COLUMBIA-EVANSVILLE REALTY, INC., individually and on behalf of all other persons owning apartment

buildings with more than four dwelling units in a single buildng located in City of Evansville, Indiana, similarly and singularly situated with the plaintiffs,

STATE OF INDIANA on the relation of Vetris C. Miller, Columbia-Evansville Realty, Inc., individually and on behalf of all other persons owning apartment buildings with more than four dwelling units in a single building located in City of Evansville, Indiana, similarly and singularly situated with the plaintiffs,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF OF RESPONDENTS IN OPPOSITION

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents pray that the application for a writ of certiorari to review a decision of the Supreme Court of the State of Indiana, entered on July 3, 1973, be denied.

JURISDICTION

Respondents object to the jurisdiction of this court alleged under 28 USC 1257(3) inasmuch as the judgment rendered by the Indiana Supreme Court does not

rely upon drawing into question a state statute (city ordinance) as repugnant to the Constitution of the United States or any other right claimed under the Constitution.

THE QUESTIONS PRESENTED

The Questions Presented by the Petitoners misstate and evade the real constitutonal issues which were before the Supreme Court of Indiana. The real question is as follows:

Does Article 1, Section 23 of the Constitution of the State of Indiana, or Section 1 of the Fourteenth Amendment to the United States Constitution preclude classifications in a city ordinance which operate to exclude dwellings with more than four units in a building from the collection of defined "household refuse" otherwise available to all other residential dwelling structures generating the identically defined "household refuse"?

STATEMENT OF CASE

Petitioners' statement of the case is substantially correct except that it does not adequately set forth the kind of classifications contained in Municipal Ordinance No. G-69-9, amending Chapter 933 of the Municipal Code of Evansville, Indiana (Exhibit C to Petition). The ordinance provides for collection of defined "household refuse" from defined "residential dwelling units." "Residential dwelling units" include all apartment buildings by definition. However, those apartment buildings of more than four units per building, and only those apartment buildings, are denied "house-

hold refuse" collection services solely because they are deemed by the ordinance as a "commercial enterprise," based upon the standard of number of units and totally without regard to the fact that they generate "household refuse" and are defined otherwise as "residential dwelling units."

REASONS FOR DENYING THE WRIT

1. No Jurisdiction—Indiana Judgment Rests Solely on State Law

The Supreme Court of Indiana has declared the operation of Chapter 933 of the Municipal Code of Evansville, Indiana, as amended by Municipal Ordinance No. G-69-9 unconstitutional, based upon the Indiana Constitution, being Article 1, Section 23, as well as under Section 1 of the Fourteenth Amendment to the United States Constitution. For purposes of analysis, the Indiana Supreme Court in its decisions, has deemed Article 1, Section 23 of the Constitution of the State of Indiana to be synonymous with Section 1 of the Fourteenth Amendment to the United States Constitution, and therefore has made its constitutional interpretation of the Indiana Constitution based upon precedent of United Supreme Court decisions. However, and most importantly the judgment of the Indiana Supreme Court independently rests upon that court's interpretation of the subject ordinance as unconstitutional under the standards of the Indiana Constitution, and even an incorrect interpretation of the precedents of this Honorable Court would not, for state purposes, undermine the solely state law basis for a judgment.

Besides 28 USC 1257(3) requirng reliance on a federal question as a basis for a state court judgment before this Honorable Court will have jurisdiction, Rule 19 1 a() of the Supreme Court of the United States also specifically requires a federal question of substance for its jurisdiction on a writ of certiorari of a state court decision. Respondents respectfully submit to this Honorable Court that there is no federal question, let alone one of substance to be determined. Rather the judgment of the Indiana Supreme Court can stand in and of itself as a determination of the Indiana Constitution.

In the case of *Herb v. Pitcairn*, 324 U.S. 117, 125, 89 L.Ed. 789, 65 S.Ct. 459, 463 (1945), the court stated that it will not review state court decisions resting on independent state grounds and recognizes the separation of state from the federal judicial system when it said:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . (citations omitted) The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions."

Carrying this one step further, this court has said that even if federal questions are raised along with

state issues, if the case can be decided on independent and state grounds and need not rely on the federal question, the court will not entertain jurisdiction over the matter. See *Henry v. State of Mississippi*, 379 U.S. 443, 13 L.Ed. 2d 408, 85 S.Ct. 564 (1965) and *Lynch v New York, ex rel. Pierson*, 293 U.S. 52, 79 L.Ed. 191, 55 S.Ct. 16 (1934).

The United States Supreme Court has gone so far as to hold even if, in essence, the reasoning in passage on federal question is incorrect, that if a decision or a judgment will rest on adequate state grounds, that the Supreme Court will not interfere with that decision. *Black v. Cutter Laboratories*, 351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824 (1956); *Williams v. Kaiser*, 323 U.S. 471, 89 L.Ed. 398, 65 S.Ct. 363 (1945).

In the case at issue it is the argument of the Petitioners that the interpretation of the applicability of the United States Constitution is incorrect. With this we respectfully disagree, but arguendo, if this would be the case the judgment still rests on an adequate state ground. As stated in the *Black* case at 298 of official reporter and at page 827 of the Supreme Court Reporter:

> "This Court, however, reviews judgments, not statements in opinions . . . This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds."

2. Petitioners' Misapplication of Unreported District Court Case

The Petitioners have attempted, by the citation of a

memorandum decision of a Federal District Court in Chicago, being *Goldstein, et al v. City of Chicago, et al,* Cause No. 72C722, which case is Exhibit D to Petitioners' petition, to suggest a dichotomy of interpretation of the Fourteenth Amediment to the Constitution, all within the Seventh Circuit, presuming, of course, that this *Goldstein* case, upon review before the Seventh Circuit will be upheld. Presumably this is an attempt to bring this within the court's Rule 19 1 (b), which applies to appeals from federal court decisions only. Not only is this appeal from a state court ruling outside that Rule of jurisdiction, but careful examination of that case indicates that while the case was brought solely on federal issues with no state issues presented in the pleadings, that the court denies relief to the plaintiff for the reason that there is no federal cause of action stated. Judge Tone said (Exhibit D, page 40 in the Petitioners' brief):

> "(If) . . . defendant officers were thus violating implicit affirmative duties with respect to plaintiffs, that violation would not give rise to a federal cause of action. Failure to follow a state statute does not, of itself, constitute a violation of a federally protected right."

The federal question discussed thereafter is merely dicta.

3. Issue Lacks Substance

Assuming, for argument sake, that the Petitioners have presented some kind of jurisdictional federal issue, the Respondents respectfully then submit that the issue is not one of substance and relates to issues

and standards already determined by this court. The Petitioners have cleverly framed the Questions Presented with a sense of the dramatic that does not really exist. In reading the Questions Presented, the reader might quickly assume that the decision of the Indiana Supreme Court requires total abandonment of refuse collection service by all municipalities or alternatively dire economic consequences.

First of all, as noted in the case of *City of New York v. Richardson*, 473 F. 2d 923, 932 (CCA2d, 1973) which case is cited as authority by the Petitioners, it must be remembered that:

> "Governmental efficiency does not legitimize unconstitutional discrimination . . ."

To follow through, it should be noted that the Petitioner City's Municipal Code, Section 933.03(1), defines "household refuse." The mere definition of the kinds of refuse to be collected immediately eliminates the requirement to collect all kinds of refuse, and immediately does away with many of the community's economic problems and gives it appropriate legislative controls. Secondly, as set forth in Section 933.04(a) of the Evansville Municipal Code, refuse collection is limited to (1) packaging in standard containers, 20-gallon containers, (2) limited in number to three containers, (3) with collection limited to a number of times per week, as provided, and (4) then only after placement of refuse containers at a curb or alley location, and in the instance of an apartment building, at a particular single location. With all of these apparently constitutional classification requirements, it becomes apparent that the great economic concern that all kinds of

refuse will have to be collected from all kinds of places in a community obviously isn't true. For example, it would be impractical for the management or residents of a 200-unit apartment building to bring to a single outside collection point, up to ~~800~~ 200-gallon containers with their refuse once a week. Unlike the individual residence or smaller apartment dwellings, larger sized residential dwellings generating the defined substance are for all practical purposes practically precluded from the benefits of collection service. In essence, the various classifications applied for collection in terms of numbers of cans, location of collections, kinds of refuse collected and frequency of collection serves to discriminate against certain kinds of residential dwellings, namely larger apartment buildings. This kind of discrimination would undoubtedly be permitted under the standards of the various cases cited by the Petitioners in their brief. But this kind of discrimination is not before the court.

The kind of discrimination that the Indiana Supreme Court found to be invalid and unjustified is an arbitrary definition of what kind of residential dwelling units generating household refuse are commercial and what are not commercial, as that classification relates to the subject matter of refuse collection.

The Petitioners suggest that the standards applied in determination of the issue by the Indiana Supreme Court, based upon the case of *United States v. Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 91 S.Ct. 16, 27 L.Ed. 2d 4 (1970) is a wrong standard and in turn cites as an appropriate standard language from *McGowan v. State of Maryland*, 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961). See Petitioners' petition at pp. 10-11.

First of all, it should be pointed out that the *Maryland Savings* case sets forth its standard, citing as its authority the *McGowan* case. Presumably the standard adopted by the later *Maryland Savings* case is either the same standard or at least a later modification by this Honorable Court of the *McGowan* decision. While there are some differences in the words, the standards in the *Maryland Savings* case of discrimination being "perceived," and in the *McGowan* case of it "may be conceived," would seem to be an argument of semantics and not supported by any other language or discussion of the court and certainly not of real substance. The Indiana court has recognized that it cannot perceive a set of facts rationally justifying the classification contained in the subject ordinance, and this should certainly sufficiently meet the constitutional standards and demonstrate appropriate effort by the Indiana court in examining and then declaring the subject Municipal Code unconstitutional in its operation.

While the Indiana court has met the standard set forth in the *Maryland Savings* case, which follows *McGowan* a proper standard which would not have been as stringent for the Indiana court to come within is found in *Reed v. Reed*, 404 U.S. 71, 30 L.Ed. 2d 225, 92 S.Ct. 251 (1971); see also *Eisenstadt v. Baird*, 405 U.S. 438, 31 L.Ed. 2d 349, 92 S.Ct. 1029 (1972) and *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 33 L.Ed. 2d 212, 92 S.Ct. 2286 (1972) The *Reed v. Reed* standard reads:

"The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the

> basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'."

See in particular the extensive analysis of a possible shifting of the Supreme Court's equal protection doctrine from *Maryland Savings* as discussed by the Honorable Judge Irving R. Kaufman of the Second Circuit in *The City of New York v. Richardson, supra*, 931, cited by Petitioners as authority, where the court concludes:

> "Clearly, these decisions seem to foreshadow an expanded judicial inquiry under the Equal Protection Clause . . ."

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petitioners' Petition For Writ of Certiorari be denied.

HARRY P. DEES
ALAN N. SHOVERS
305 Union Federal Building
Evansville, Indiana 47708
Attorneys for Respondents

KAHN, DEES, DONOVAN & KAHN
305 Union Federal Building
Evansville, Indiana 47708
Telephone: 812/423-3183
Of Counsel for Respondents